



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

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MAIL STOP APPEAL BRIEF - PATENTS
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Dated: 18 January, 2004

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Serial No. : 09/674,443 Confirmation No. (None assigned)
Appellant : Sherif Safwat
Filed : October 27, 2000
Title : BIOELECTRIC SIMULATING FISH-
HOOK AND LURE AND METHOD OF
USING SAME
TC/A.U. : 3643
Examiner : Kurt C. Rowan
Docket No. : 2146
Customer No.: 23320

MAIL STOP APPEAL BRIEF - PATENTS
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Sir:

REPLY BRIEF

Pursuant to 37 C.F.R. § 1.193, through his undersigned attorney the Appellant submits the following brief, in triplicate, in reply to an Examiner's Answer mailed November 17, 2004.

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Argument

All claims pending in the present application stand rejected for obviousness. As explained below, the July 1, 2003, and March 8, 2004, Office Actions combined with the Examiner's Answer:

1. fail to establish *prima facie* obviousness of the inventions claimed in the present application; and
2. violate controlling judicial precedents and instructions of the Manual of Patent Examining Procedure ("MPEP").

Summary of the Invention

The invention, as presently expressed in the independent claims, is fishing gear which includes an electret for inducing a strike response in fish.

Failure to Establish Prima Facie Obviousness

The rejection of claims for obviousness in the July 1, 2003, and March 8, 2004, Office Actions and in the Examiner's Answer depends not upon a combination of references, but in each instance, fundamentally, upon a modification of a single reference. As admitted in the Examiner's Answer, none of the references expressly discloses an electret. Rather, the Richard and Massie patents both disclose creating an electric field by galvanic action of dissimilar metals immersed in water, while the Rodgers patent discloses creating an electric field by a battery, i.e. a sealed galvanic

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cell, located within a lure which is coupled to electrodes on the lure's surface.¹

MPEP Eighth Edition, May 2004 Revision, defines *prima facie* obviousness as follows.

2142 Legal Concept of *Prima Facie* Obviousness

* * *
The examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness. If the examiner does not produce a *prima facie* case, the applicant is under no obligation to submit evidence of nonobviousness. (See page 2100-128.)
* * *

ESTABLISHING A *PRIMA FACIE* CASE OF OBVIOUSNESS

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings.
* * *

The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). See MPEP § 2143 - § 2143.03 for decisions pertinent to each of these criteria.

The initial burden is on the examiner to provide some suggestion of the desirability of doing what the inventor has done. "To support the conclusion that the claimed invention is directed to obvious subject matter, either the references must expressly or impliedly suggest the claimed invention or the examiner must present a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light of the teachings of the references." *Ex parte Clapp*, 227 USPQ 972, 973 (Bd. Pat. App. & Inter. 1985). See MPEP § 2144 - § 2144.09 for examples of reasoning

¹ The Barfield patent has been cited solely for its disclosure of an artificial lure.

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supporting obviousness rejections. (See page 2100-128 and 2100-129.) (Emphasis supplied.)

2143.01 Suggestion or Motivation To Modify the References [R-2]

THE PRIOR ART MUST SUGGEST THE DESIRABILITY OF THE CLAIMED INVENTION

* * *

Obviousness can only be established by . . . modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either explicitly or implicitly in the references themselves or in the knowledge generally available to one of ordinary skill in the art. (See page 2100-129 and 2100-130.)

FACT THAT REFERENCES CAN BE COMBINED OR MODIFIED IS NOT SUFFICIENT TO ESTABLISH PRIMA FACIE OBVIOUSNESS

The mere fact that references can be . . . modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990)

* * *

Although a prior art device "may be capable of being modified to run the way the apparatus is claimed, there must be a suggestion or motivation in the reference to do so." 916 F.2d at 682, 16 USPQ2d at 1432.). (See page 2100-131.)

Controlling judicial precedents fully support and mandate MPEP's preceding instructions.

The motivation, suggestion or teaching may come explicitly from statements in the prior art, the knowledge of one of ordinary skill in the art, or, in some cases the nature of the problem to be solved. See *Dembiczak*, 175 F.3d at 999, 50 USPQ2d at 1617. In addition, the teaching, motivation or suggestion may be implicit from the prior art as a whole, rather than expressly stated in the references. See *WMS Gaming, Inc. v. International Game Tech.*, 184 F.3d 1339, 1355, 51 USPQ2d 1385, 1397 (Fed. Cir. 1999). The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature

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of the problem to be solved as a whole would have suggested to those of ordinary skill in the art. See In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981) (and cases cited therein). Whether the Board relies on an express or an implicit showing, it must provide particular findings related thereto. See Dembiczak, 175 F.3d at 999, 50 USPQ2d at 1617. **Broad conclusory statements standing alone are not "evidence."** Id. In re Werner Kotzab, 217 F.3d 1365, 1369, 55 USPQ2d 1313, 1316 (Fed. Cir. 2000). (Emphasis supplied.)

Four (4) pages of Exhibit A attached hereto collect in one place all statements appearing in the July 1, 2003, and March 8, 2004, Office Actions and in the Examiner's Answer which could possibly be construed as disclosing a motivation or suggestion for modifying the references. One cannot find anywhere in the July 1, 2003, Office Action, in the March 8, 2004, Office Action or in the Examiner's Answer a convincing line of reasoning as to why the artisan would have found the claimed invention to have been obvious in light of the teachings of the references as required by MPEP *supra*.

All one finds in the July 1, 2003, and March 8, 2004, Office Actions and in the Examiner's Answer collected in Exhibit A justifying the obviousness rejection of claims are broad conclusory "it would have been obvious" type statements. Under the controlling judicial precedent of In re Werner Kotzab *supra* citing Dembiczak *supra*, such broad conclusory statements fail to provide "evidence" needed to establish *prima facie* obviousness of the

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claimed invention. As stated in Dembiczak supra, broad conclusory statements standing alone are not "evidence."

Because the July 1, 2003, and March 8, 2004, Office Actions and the Examiner's Answer all lack any line of reasoning and all fail to provide "evidence" of any motivation or suggestion for modifying the references, they collectively fail to establish *prima facie* obviousness needed for properly rejecting the pending claims. Consequently, because there exists no legally sufficient *prima facie* basis for rejecting the pending claims, Appellant respectfully request that this Board declare them allowable.

Claims Are Admittedly Allowable

Not only do the July 1, 2003, and March 8, 2004, Office Actions and the Examiner's Answer fail to establish *prima facie* obviousness of the pending claims, the Examiner's Answer, when combined with express disclosures in the Richard patent, implicitly admits facts that, under MPEP and controlling judicial precedents, prove the pending claims to be nonobvious.

The Richard Patent

In arguing that claims have been properly rejected for obviousness based upon the Richard patent, the Examiner's Answer correctly states:

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[t]he definition of an electret is a solid dielectric that exhibits persistent dielectric polarization. (See page 4, lines 9-10.)

However, seeking facts in the Richard patent's disclosure that justify the obviousness rejection, the Examiner's Answer states:

Richard shows a biosimulating fish hook having a shank,
an eye and a bend with a point terminating on the shank.

* * *

In Richard with the anodic segment and the cathodic segment being separated by dielectric 7, a persistent dielectric polarization occurs since an electric field is set up between the anodic segment and cathodic segment with the plastic in-between. (See page 4, lines 7-12.) (Emphasis supplied.)

Regarding the preceding allegation, Appellant first observes that the structure disclosed in the Richard patent does not provide a "persistent . . . polarization." The material composition of the fish hook disclosed in the Richard patent produces galvanic action and a galvanic couple only upon immersion in water, preferably seawater. Consequently, while the fish hook disclosed in the Richard patent remains in air there exists no galvanic action and no galvanic couple. Without galvanic action and its consequent galvanic couple, the fish hook disclosed in the Richard patent fails to exhibit any "polarization." Whatever "polarization" the fish hook disclosed in Richard patent may exhibit, it exhibits such polarization only upon immersion in water, i.e. the "polarization" is not "persistent." Therefore, the preceding statement excerpted from the Examiner's Answer is factually incorrect in alleging that

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the structure disclosed in the Richard patent produces "persistent dielectric polarization."

To bulk up the allegations excerpted above, the Examiner's Answer further states:

Also, it is not seen that the proposed modification of Richard would cause Richard to be inoperative for its intended purpose which is catching fish.² The fish hook of Richard will still corrode and break after exposure to water since the addition of an electret would not preclude the use of two dissimilar metals on other parts of the hook shank to have the same effect of corroding rapidly in water. (See page 5, lines 5-9.)

Rephrasing the preceding allegation, the Examiner's Answer admits is that a fish hook with just an electret attached thereto will not corrode swiftly, or if made of stainless steel might never corrode. Therefore, to make a fish hook with an electret attached thereto corrode swiftly which is the object of the Richard patent, according to the Examiner's Answer just put two dissimilar metals somewhere else on the electret equipped fish hook, i.e. reproduce on the electret equipped fish hook the electric field producing, galvanic action metallic structure disclosed in the Richard patent.

² If the purpose of the invention disclosed in the Richard patent were merely a fish hook for "catching fish" as alleged in the Examiner's Answer, then Appellant respectfully submits that the Richard patent was clearly erroneously issued due to at least on 2000 years of anticipatory prior art. Being unwilling to allege that the Richard patent was erroneously issued and is therefore invalid, Appellant respectfully submits that the intended purpose for the invention disclosed in that reference must be something more than merely "catching fish."

Now consider the preceding characterizations of the Richard patent's disclosure in the Examiner's Answer in comparison with the reference's text.

When immersed in seawater, the resulting galvanic couple causes the small anodic area to corrode rapidly and the hook to eventually break. In a preferred embodiment, a temporary protective coating is provided for at least one member of the couple to delay the onset of corrosion of the steel anodic area so that the hook can retain 100 percent of its strength for a substantial period of usage in seawater before corrosion of the steel body is initiated. (Abstract) (Emphasis supplied.)

In this method, at least one small section of the surface of the steel fish hook is designated as an anodic area where rapid corrosion and eventual hook breakage is desirable. For example, one such location is in the bend of the hook adjacent to the barb. Another suitable anodic area is the entire end of the hook, including the point, barb, and a small adjacent section of the bend. The selected anodic area is then temporarily protected, for example with a plastic coating mask and the remaining much larger surface of the hook is electroplated, or otherwise plated, with a highly cathodic (more noble) metal. When the temporary plastic coating mask is removed from the small anodic area, the hook surface then comprises a small anodic area of unprotected steel and a much larger surface area of highly cathodic metal. When the hook is subsequently immersed in seawater, a galvanic couple is formed which results in the rapid corrosion of the anodic area and eventual breakage of the steel hook at that location. (Col. 2, lines 6-26.) (Emphasis supplied.)

In FIG. 2a the conventional steel 6 hook body is covered with a protective metal plating 3. In FIG. 2b a plastic band 7 covers an annular section of the hook surface designated to be the small anodic area. In FIG. 2c, a highly cathodic metal plating 8 has been applied over the metal plating 3 except for the annular surface protected by the plastic band 7. In FIG. 2d, the plastic band 7 has been removed so that an annular surface of exposed metal plating 3 defines a relatively small anodic area subject to corrosion when immersed in seawater because of

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the galvanic coupling with the much larger area of cathodic plating 8. FIG. 2c shows an annular surface of exposed steel 4 after the metal plating 3 in FIG. 2d was immersed in seawater for a relatively brief period of time, e.g., 24 hours. FIG. 2f shows the highly corroded annular surface of exposed steel 4 after several days immersion in seawater as a result of the galvanic coupling with the cathodic plating 8. (Col. 3, lines 35-52.) (Emphasis supplied.)

Ideally, a self-destruct fish hook would retain 100 percent of its strength until it becomes embedded in a fish, and only then would it start to degrade at the maximum rate. Therefore, one preferred method for delaying the onset of corrosion of the anodic area is to provide a relatively fragile plastic sleeve to cover the shaft of the hook, including at least a portion of the cathode area, thus blocking the seawater path of the galvanic circuit. When the hook becomes embedded in a fish, the fragile plastic sleeve is stripped away or otherwise disrupted by mechanical agitation, or by chemical reaction with fish tissue, so that the circuit is completed to allow corrosion of the anodic area. (Col. 4, lines 50-62.)

For example, a fragile plastic sleeve covering the anodic area can be used to delay the onset of corrosion until it is mechanically or chemically disrupted when the hook is embedded in fish bone or tissue. (Col. 5, lines 1-5.) (Emphasis supplied.)

One advantage to the use of a temporary covering over the cathode area to delay the onset of corrosion of the anodic area (as mentioned previously) is that it would also protect the point of a re-sharpened hook from accelerated corrosion as long as the cathode covering remained essentially intact. If the point end of the hook is anodic and the shank cathodic, and the point end is plated with a sacrificial metal (i.e., anodic to steel in seawater) such as cadmium or "perma-plate," the re-sharpened point (exposed steel) will be protected from rust by the adjacent small area of exposed sacrificial metal as long as the cathode remains covered. (Col. 5, lines 52-63.) (Emphasis supplied.)

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The preceding excerpts from the Richard patent irrefutably establish that while the plastic band (dielectric) 7 covering the anode remains on the fish hook galvanic action does not occur. Consequently, while the plastic band (dielectric) 7 remains on the fish hook covering the anodic region, due to the absence of galvanic action the fish hook exhibits no electric field even if the fish hook were immersed in seawater.

Thus, while the structure remains intact which the Examiner's Answer declares to be essential for the Richard patent to render the claimed invention obvious, the fish hook disclosed in that reference:

1. provides no biostimulating electric field; and
2. is inoperative for the reference's stated intended purpose, i.e. breaking after being immersed in seawater for some interval of time.

Furthermore, only if the structure which the Examiner's Answer declares to be essential for the Richard patent to render the claimed invention obvious were destroyed does the fish hook disclosed in that reference become:

1. capable of providing a biostimulating electric field; and
2. operative for the reference's stated intended purpose, i.e. breaking after being immersed in seawater for some interval of time.

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Thus, combining the Examiner Action's allegations regarding the Richard patent with the reference's express disclosures excerpted above irrefutably establishes that the fish hook structure which the Examiner's Answer declares to be essential for rendering the pending claims obvious renders Richard patent's fish hook inoperable for its intended purpose, i.e. breaking after being immersed in seawater for some interval of time. Since the modifications which the Examiner's Answer declares to be essential to rejecting the pending claims for obviousness based upon the Richard patent render that reference's fish hook inoperable for its intended purpose, controlling authority such as In re Gordon, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984) and MPEP § 2143.01, Eighth Edition, May 2004 Revision, at page 2100-131 - 132, mandate that this Board declare the pending claims allowable.

If there be any need for further proof that the pending claims are allowable over the cited references, then MPEP § 2143.01, Eighth Edition, May 2004 Revision, at page 2100-132 provides such further proof.

As established above, the Richard and Massie patents both disclose creating an electric field by galvanic action of dissimilar metals immersed in water, while the Rodgers patent discloses creating an electric field by a battery enclosed within a lure which is coupled to electrodes on the lure's surface. The

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Examiner's Answer defines an electret to be a solid dielectric that exhibits persistent dielectric polarization.

The preceding definition from the Examiner's Answer establishes that an electret is not:

1. galvanic action which occurs upon immersion of dissimilar metals in water; or
2. a battery, i.e. a sealed galvanic cell.

Consequently, substituting an electret for galvanic action, either in the form of dissimilar metals immersed in water or in the form of a battery, as required by all claim rejections changes the basic operating principle of the references.³ MPEP § 2143.01, Eighth Edition, May 2004 Revision, at page 2100-132 unambiguously and unequivocally states that:

[i]f the proposed modification . . . of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims prima facie obvious.

Thus, MPEP § 2143.01 mandates that this Board declare the pending claims allowable.

³ Note that a galvanic couple, regardless of its form, ultimately ceases to operate after materials forming the couple become consumed. Conversely, the definition of an electret requires that, while it remains physically intact, it continuously exhibits persistent dielectric polarization and never ceases to operate, i.e. the material(s) forming an electret are never consumed and the dielectric polarization, i.e. electric field, never goes away.

Conclusion

For the reasons set forth in greater detail above, Appellant respectfully submits that the pending claims are allowable because the July 1, 2003, and March 8, 2004, Office Actions combined with the Examiner's Answer:

1. fail to establish *prima facie* obviousness of the claimed inventions; and
2. violate controlling judicial precedents and directions stated in the Manual of Patent Examining Procedure ("MPEP") by:
 - a. rendering the reference inoperable for their intended purposes; and
 - b. changing the references' basic operating principle.

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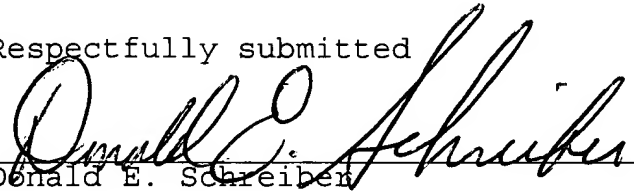
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For each and every one of the preceding reasons, this Board must immediately bring an end to this canard by declaring the pending claims allowable.

Respectfully submitted



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POSSIBLY MOTIVATIONAL OR SUGGESTIVE ALLEGATIONS

The Richard Patent

July 1, 2003 Office Action

In reference to claim 1, it would have been obvious to provide Richard with the electret disposed on the shank adjacent the hook eye since a breakage at this point would also cause the hook to fail. In reference to claim 13, Richard does not disclose that the material forming the enlarged portion adjacent the eye (compared to the bend 4 in Fig. 1c) is heavier than the material of the shank, but it would have been obvious to employ heavier material at the enlarged portion of the hook to alter the balance of the hook depending on fishing conditions, the type of lure action being sought, and whether a trailer is mounted to the hook. In reference to claim 14, Richard shows one bend and one point, but it would have been obvious to employ a double hook (which would have a pair of bends) for the purpose of increasing the chance of hooking the fish. In reference to claim 40, Richard shows all of the elements recited with the exception of the extension hardware coupled to the eye. However, it would have been obvious to employ old and well extension hardware to space the hook from the fish line.

The examiner takes Official Notice that double hooks along with a pair of bends and extension hardware are old and well known in the art. (See page 3, line 7 through page 4, line 2.) (Emphasis supplied.)

March 8, 2004 Office Action

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the knowledge is generally available to one of ordinary skill in the art. In regard to claim 1, applicant has misinter-

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preted the rejection. The examiner merely finds it obvious for the hook to break on the shank rather than in the bend. See Line 9 of the paragraph 4. the modification of the Richard patent does not cause the patent to become unsatisfactory for its intended use or change the principle of operation of the Richard patent. The modification merely changes where the hook breaks. (See page 3, lines 2-15.) (Emphasis supplied.)

Examiner's Answer

In Richard with the anodic segment and the cathodic segment being separated by dielectric 7, a persistent dielectric polarization occurs since an electric field is set up between the anodic segment and cathodic segment with the plastic in-between. Hence it would have been obvious to provide Richard with a known electret since merely replacing one biosimulator for another would have been obvious since the function is the same. (See page 4, lines 10-15.) (Emphasis supplied.)

Also, it is not seen that the proposed modification of Richard would cause Richard to be inoperative for its intended purpose which is catching fish. The fish hook of Richard will still corrode and break after exposure to water since the addition of an electret would not preclude the use of two dissimilar metals on other parts of the hook shank to have the same effect of corroding rapidly in water. (See page 5, lines 5-9.)

The Barfield Patent

July 1, 2003 Office Action

In reference to claims 4-5, it would have been obvious to provide the hook of Richard with an artificial lure mounted on the fishhook for the purpose of attracting more fish to the lure and inducing those to strike the lure which increases the number of fish caught. (See page 4, lines 6-9.) (Emphasis supplied.)

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March 8, 2004 Office Action

(This Office Action lacks any explanation of the rejection of claims based upon the Barfield patent.)

Examiner's Answer

(The Examiner's Answer lacks any explanation of the rejection of claims based upon the Barfield patent.)

The Massie Patent

July 1, 2003 Office Action

In reference to claim 22, it would have been obvious to provide Massie with anodic and cathodic segments on the same strand although Massie shows separate strands the anodic and cathodic since the function is the same and no stated problem is solved. (See page 4, lines 16-18.) (Emphasis supplied.)

March 8, 2004 Office Action

In reference to claims 17 and 22, rejected by both Rodger and Massie, applicant asserts that the modification is unobvious and that principle of operation is changed, but provides no evidence as to how the principle of operation is changed and why the modification is unobvious. The principle of operation is the same. (See page 3, lines 15-19.) (Emphasis supplied.)

Examiner's Answer

(The Examiner's Answer fails to identify any suggestion in the Massie patent.)

The Rodgers Patent

July 1, 2003 Office Action

In reference to claims 17 and 22, it would have been obvious to provide Rodgers with an electret on one of the strands rather than use two strands to make up the electret since the function is the same. Rodgers does not disclose replacing the fishhook to change cathodic

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segments, but it would have been obvious to change the fishhook to change cathodic segments instead of replacing segments 11, 13 since the function is the same and no stated problem is solved. (See page 5, lines 7-12.) (Emphasis supplied.)

March 8, 2004 Office Action

In reference to claims 17 and 22, rejected by both Rodger and Massie, applicant asserts that the modification is unobvious and that principle of operation is changed, but provides no evidence as to how the principle of operation is changed and why the modification is unobvious. The principle of operation is the same. (See page 3, lines 15-19.)

Examiner's Answer

(The Examiner's Answer lacks any explanation of the rejection of claims based upon the Rodgers patent.)